1994

Terral H. Ernstsen v. Ila M. Ernstsen : Reply Brief

Utah Court of Appeals

Clark R. Ward, Esq.; Attorney for Appellee.
Craig M. Peterson; Joanna B. Sagers; Littlefield & Peterson; Attorney for Appellant.

Craig M. Peterson (2579)
Joanna B. Sagers (5632)
Attorney for Defendant/Appellant
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

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IN THE UTAH COURT OF APPEALS

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TERRAL H. ERNSTSEN,	:	**REPLY BRIEF OF APPELLANT**
Plaintiff/Appellee,	:	
v.	:	Priority No. 15
ILA M. ERNSTSEN,	:	
Defendant/Appellant.	:	Case No. 940069 CA

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Appeal from an Order in the Third Judicial District Court,
in and for Salt Lake County, State of Utah,
the Honorable David S. Young, Judge presiding.

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Attorney for Appellee

Clark R. Ward, Esq.
64 East 6400 South, Suite 205
Salt Lake City, Utah 84107
Telephone: (801) 266-6444

Attorney for Appellant

Craig M. Peterson
Joanna B. Sagers
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

J10\ernst.cvr

Craig M. Peterson (2579)
Joanna B. Sagers (5632)
Attorney for Defendant/Appellant
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426 South 500 East
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Clark R. Ward, Esq.
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Craig M. Peterson
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LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

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CASES:

STATUTES:

This Brief is filed by Appellant in Reply to arguments raised by Appellee in his Response Brief of Appellee.

The Appellee has made numerous errors and misstatements of testimony as well as inaccurate citations to the record in his Statement of the Case and Course of Proceedings that must be corrected.

CORRECTIONS TO APPELLEE'S STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS

1. At paragraph (2) on page 5 of Response Brief of Appellee states:

> (2) At pre-trial, Commissioner Sandra Peuler awarded wife $2,000 per month as temporary alimony. [R 23-25]

The document which Plaintiff is citing is not the pre-trial Recommendation of Commissioner Peuler but rather is the Temporary Order signed by Commissioner Arnett on December 6, 1991, wherein he awarded the Defendant $2,000 per month as alimony.

2. At the pre-trial conference held November 5, 1992, Commissioner Peuler proposed that permanent alimony be set at $2,000 per month. [R 93]

3. At paragraph (4) on page 5 of Response Brief of Appellee, the Appellee states:

> (4) Only the alimony issue remained for the bench trial of January 7, 1993. [TR 470-473]

However, the issue of the value of the personal property distribution remained as well as the issue of attorney's fees. [TR 474, 542]

4. At paragraph 7.B. on page 10 of Response Brief of Appellee, the Appellee states:

> 7.B. The parties never lived together in the home at Fruitland, Utah. [TR 533]

The Plaintiff cites the following examination regarding that home:

Mr. Peterson: Was that your marital residence during the latter years of your marriage?

Ila Ernstsen: Well, just the last few months of our marriage--well, before he filed for divorce because--

It is clear from Defendant's testimony that the parties did live together in the home at Fruitland, Utah, during the last few months of the marriage.

5. At paragraph 7.D. on page 10 of Response Brief of Appellee, the Appellee states:

> 7.D. Wife would return to the Fruitland cabin only in the Summer when weather permitted. [TR 536]

This statement is simply incorrect. The Defendant testified as follows:

Mr. Peterson: Now, Mrs. Ernstsen, Ila, I just want to cover a couple of these with you very quickly. The condominium fee. You currently are incurring and you will continue to incur that through the rest of this winter until you are able to move back up to Fruitland Height; is that correct?

Ila Ernstsen: Yes.

Mr. Peterson: That will be eliminated as a monthly expense when April or May gets here and you can get back in and reopen your home and make your permanent residence back in your home; is that correct.

Ila Ernstsen: Yes. [TR 536]

It is clear from the Defendant's testimony that she intended Fruitland to be her permanent residence.

6. At paragraph 9 on page 11 of Response Brief of Appellee, the Appellee states the following:

> 9. Wife's "expert" witness is a CPA who happens to be her nephew. [TR 406] Wife's counsel and Peterson have been best friends for over twenty years (since 1971) and have traveled the world together. [Id.] Even their wives are often confused for each other. [Id.] Peterson has appeared as an expert witness for wife's counsel's client [Id.]

However, Randall Petersen also testified as follows:

Craig Peterson: You have appeared in cases both in opposition to the party that I am representing as well as the party that I am representing; is that correct?

Randall Petersen: That's correct.

Craig Peterson: You have been qualified in cases as an expert person in more than a dozen cases before this Court; is that correct?

Randall Petersen: Yes.

Craig Peterson: And what you are dealing with here today in presenting to the Court, would your position as the nephew of Ila Ernstsen or your position as my friend, personal friend and acquaintance, influence your testimony?

Randall Petersen: No.

Craig Peterson: Have you attempted in the past when you have appeared as a witness in, as an expert, in behalf of clients that I represent or as an expert in behalf of clients which are in opposition to me, have you, in fact, tried to present your testimony in the same basis regardless of who you are appearing in behalf of?

Randall Petersen: I believe there are facts I testify to.[T R 407-408]

7. At paragraph 9.A. on page 11 of Response Brief of Appellee, the Appellee states:

> 9.A. Peterson reviewed <u>solely</u> (1) the parties' 1988-1991 individual <u>income</u> tax returns and (2) only the <u>income</u> from, <u>but not</u> Vaughn Cox' <u>actual</u> report of Ernstsen Plumbing's income for the fiscal years 1988 to 1991. [TR 408, 432, 447]

The statement, "only the income from but, not Vaughn Cox' actual report of Ernstsen Plumbing's income for the fiscal years 1988 to 1991" is misleading. Randall Petersen testified that he used a section of Vaughn Cox' report that discloses the corporation's income for the fiscal years 1988, 1989, 1990 and 1991. [TR 408]

8. At paragraph 9.B. on page 11 of Response Brief of Appellee, the Appellee states:

> 9.B. ...Peterson gave no authoritative basis for his opinion the District Court clearly accepted Morris' opinion that cash expenditure and depreciation equals out. [TR 429]

This statement goes to argument rather than a statement of the case and course of proceedings; and, consequently, should be stricken from this portion of the Brief. In addition, the transcript at page 429 is interrogation of Randall Petersen by Judge Young in support of his personal theories. Mr. Morris had not even testified before the Court yet; the Court could not have "accepted Morris' opinion" at that point. The statement that the District Court clearly accepted Morris' opinion that cash expenditure and depreciation equals out "[TR 429]" is not evidenced by the citation given by Appellee nor anywhere else in the evidence, pleadings or the Court's ruling.

9. At paragraph 9.D. on page 11 of Response Brief of Appellee, the Appellee states:

> 9.D. Peterson thinks most of the trucks were paid off by 1991. [TR 427] In fact husband's Exhibit 5 shows (a) 223 monthly truck installments for a total of approximately $93,000 remaining [husband's exhibit 5] AEE's Addendum No. 4

That statement is false. Randall Petersen testified as follows:

> Clark Ward: So then over time doesn't cash and depreciation equal themselves out?
>
> Randall Petersen: I guess it depends on how you depreciate the asset. He paid for some of those over six months. I think most of the cars, <u>until</u> 1991, had been paid for. [TR 427]

In addition, Plaintiff's Exhibit No. 5 simply outlines the following payments from Zions Bank:

1991	Ford L-150	$445.95	43 payments
1992	Isuzu	465.85	46 payments
1993	Isuzu	487.31	50 payments

These are nothing more than installment payments over time and they total $65,034.50, not $93,000 as represented by Defendant.

10. At paragraph 9.E. on page 11 of Response Brief of Appellee, the Appellee makes the following statement:

> 9.E. ...Peterson's bald statement was unsupported by a scintilla of evidence or authoritative basis for his "opinion."

This statement should be stricken from this portion of the Brief as it is argument rather than a statement of the case in the course of proceedings. In any event, Plaintiff has ignored the testimony of Randall Petersen whereby foundation was laid to qualify him as an expert:

Craig Peterson:	Mr. Petersen, you are a Certified Public Accountant licensed to practice in the State of Utah, is that correct?
Randall Petersen:	Yes.
Craig Peterson:	And how long have you been so licensed?
Randall Petersen:	Approximately 20 years.
Craig Peterson:	And in that regard, you have your own accounting firm?
Randall Petersen:	Yes.
Craig Peterson:	You have been qualified in cases as an expert person in more than a few dozen cases before this Court, is that correct?
Randall Petersen:	Yes. [TR 405, 407]

11. At paragraph 9.G. on page 13 of Response Brief of Appellee, the Appellee states:

> 9.G. Husband is replacing his salary with truck lease payments. [R 420] Petersen's statement was totally uncorroborated showing husband simultaneously increased his lease payments and decreased his salary. To the

contrary, the evidence is that the lease payments remained essentially the same throughout the period in question.

In reviewing the citation given out of context by Appellee, Randall Petersen testified that if the corporation does not pay the Defendant the lease payment then there is more cash available in the corporation. The citation by Appellee actually occurred, once again, during examination by Judge Young:

Judge Young: Well, I guess--let me ask it differently. I don't see that the location of the ownership, whether it is individual or corporate, makes that much difference in what I'm asking you, because if you take a net marital estate and you divide the net marital estate but one of the parties is receiving income from the operation of one of the assets, all right? Let's just take one party has a $100,000. C.D. and the other party has a $100,000 house. All Right? Now, why do you take the money earned off the C.D. and call it income and leave the house idle and don't call it anything?

Randall Petersen: Because the C.D. is, in fact, earning income.

Judge Young: There's no question about that. But if the party wished to sell the house and make the house a $100,000 C.D., it would be earning income and it would be offset.

Randall Petersen: Well, but in this case there is no reason to pay the lease payments out of the corporation and, in fact, I mean, he's simply replacing his wages with lease payments. I mean, you got to add those two together because that's total compensation to him. I mean, that's cash money that's coming out of the corporation and being expensed.

Judge Young: I recognize that.

Randall Petersen: And when you expense that at the corporate level, that has been down valuing the value of the corporation due to those lease payments.

Judge Young: Well, that's right. So if it's down valuing the corporation then you may have to re-adjust the value of the corporation.

Randall Petersen: No, that's already been done. He has used the net incomes after those expenses. I guess, still, my best example is take the lease payments and throw 'em out of there and give him compensation, and it is the same thing, the assets are held by the corporation and you're right, it doesn't matter where they are held. What you are talking about is the cash flow from the corporation to him in either the form of wages or lease payments. And if you don't pay him the lease payments, then there is more cash available and I increase this add back for corporate income.

Judge Young: Well, I don't quite--it is not entirely clear to me how you would be considering those assets differently, because if I've taken my example, and in your case the corporation is the $100,000 C.D. and the cabin is the $100,000 idle asset in this particular case, now if one party from their asset that is being awarded to them independently is receiving the working asset and the other is receiving the idle asset, why should you take the generated income off the working asset and call it personal income rather than from employment and effort you don't take anything off the idle asset?

Randall Petersen: Well, the idle asset isn't producing income.

Judge Young: Well, I know that, but it can be changed.

Randall Petersen: Well, we are talking about where the person lives. I mean, there is no availability.

Judge Young: I'm not talking about where the person lives I'm talking about a recreational property and I'm talking about something that could be sold and changed into a working asset. It seems to me that you're mixing the--and this is where I'd like you to clarify it for me--but it seems to me that you're mixing the assets. And when you divide assets you ought to take the assets out and the earnings off of the assets. If one party keeps a C.D. that's going to give 'em income, another party keeps a cabin that's going to give 'em no income, then you don't take the party getting the C.D., throw that into their gross income because, for the purpose of paying alimony, because that's what they've chosen to do with their working asset. So what I'm saying--

Randall Petersen: I see what you're saying. Then I think what you've got to do is, because the corporation is the working asset, it is the thing that is producing the income, and if you are going to do that, maybe your best approach would be to assume, okay, let's take the equity on the real property asset and let's assume some kind of return.

Judge Young: Right. Exactly.

Randall Petersen: A three or four percent return currently is about all you can get out of it if you can convert it to cash, whatever that equity is.

Judge Young: You could do it that way or you could say, let's ignore both--I can see if he is keeping his earnings low and then supplementing it by a lease payment that perhaps his earnings, in effect, are net higher, the asset is generating more earnings and I can see a need to make some adjustment in that regard, but if I take--let's just suppose this case. Suppose we have two people, husband and wife, married, and that they both bring into the marriage, prior to the marriage, an asset. She brings in a house worth $100,000, he has sold his prior house worth $100,000 and has contact income. Okay?

Randall Petersen: Mm-Hmm.

Judge Young: All right. Now, they live together in their marriage, and let's just assume that the contract comes into the marriage, all right? Now, when you divide the marriage up at the end do you say, well, okay, you keep the house, to her, in my example, but you get nothing because all of your contract income came into the marriage?

Randall Petersen: No. I think you take the value of the house and you take the value of the contract.

Judge Young: And you back it out.

Randall Petersen: Whatever the outstanding value is you add them together.

Judge Young: After the marriage?

Randall Petersen: No, at the time of the divorce. Because they both had the benefit of cash flow from the contract, right?

Judge Young: Right.

Randall Petersen: An as Terral and the family have had advantage of the income from Ernstsen Plumbing. An so you take the two assets, the house and whatever the contract balance remaining is, you add 'em together and divided by two. And the income over that period of time doesn't represent the return of the principal payments, it only represents the interest portion of that.

Judge Young: I can see that. I don't have any problem following that one. I could do it that way too.

Randall Petersen: An that's my point here. I think that the corporation has provided a return in terms of cash to this family to live on and that's what I'm trying to arrive at. What is the cash available from the business to provide them a living. I mean, we have looked at the asset itself and valued it and said it's worth $95,000, and I think that value is in the trucks and the equipment and the good will and the accounts receivable. I think those are all assets that are value. I don't think it has anything to do with the income that was generated by that asset for the family to live on. I mean, it looks to me like you got to look at it in terms of cash that was available after they pay taxes and all the other things. Again, he could have left his salary. Instead of $40,000 he could have left it at $20,000 and we'd have another $20,000 of income in the corporation. And I think you can't ignore that.

Judge Young: I agree. I don't have any problem with that but I do see a difference in, if you're dividing equities, once you divide the equities you can't very well say that one equity, which goes to him, is nevertheless going to be eroding by the annual yield off of that equity for the purpose of dividing--or for the purpose of supplementing his income. To me, that doesn't make sense.

Randall Petersen: Well, but here we put the value that we're--Vaughn Cox has put the value of the vehicles into the corporation. Now the value of the corporation is established. If that had been the case in all of these years that he was taking lease payments out of there, there'd be more income.

Judge Young: I understand that.

Randall Petersen: That's the best analogy I can make, I think.

Judge Young: Thank you. [TR 418-424]

The last two sentences of paragraph 9.G. should be stricken as they are not a statement of the case and course of proceedings. Furthermore, the Plaintiff's statement that "the evidence shows that the lease payments remain essentially the same throughout the period in question" is not correct and is not supported by the record. [TR 486, 487]

12. At paragraphs 9.H., 9.I. 9.J. and 9.K. of Appellee's Brief, the citation to transcript page numbers are incorrect.

13. At paragraph 9.L. on page 15 of Response Brief of Appellee, the Appellee states:

> 9.L. Petersen acknowledged that unlike the trucks, the Fruitland cabin will not wear out and require replacement. [TR 486]

The citation to the record is again incorrect. The correct citation is [TR 434]. In addition, paragraph 9.L. is a misstatement of Randall Petersen's testimony. Randall Petersen testified as follows:

Clark Ward: While, the trucks depreciate and the cabin does not, first of all, right?

Randall Petersen: Under the tax law, real property does depreciate. Part of the real property does depreciate just like trucks do.

Clark Ward: Okay. But the cabin does not need to be replaced when it wears out approximately every three or four years like the trucks probably will.

Randall Petersen: Yes. That's right.

14. At paragraph 10.D, on page 15 of Response Brief of Appellee, the Appellee misstates the Court's finding:

> 10.D. Husband's monthly income of $2,914.34 multiplied by 52 weeks divided by 12 months equals $1,457 per month [TR 453]

This is an inaccurate statement of the Court's finding. Judge Young made the following finding:

> Now, Mr. Ernstsen has the benefit of having his [assets] work better than that because of his leases on the trucks that are part of his asset, he has it working at the rate of $787.78. The difference between the $674.44 which is being imputed to both parties, and the $787.78 is $106.34 per month. So Mr. Ernstsen's income is determined by the Court to reasonably be $2,808.00 as salaried income, $106.34 as surplus equitable earnings, for a combined total of $2,914.34 per month. That times twelve is $34,972.08. That divided by two is $17,486.00 that should go to each. Dividing that by two, it is $1,457.00 per month. The Court determines that it would be appropriate for Mr. Ernstsen to pay $1,451.00 per month as alimony. [TR 453]

15. At paragraph 16.F. on page 18 of Response Brief of Appellee, the Appellee states:

> 16.F. ...No bias or prejudice was manifested at the pre-trial conference. [R 354]

This statement should read, "If the issue of bias or prejudice is a legitimate one, it was manifest at the pre-trial conference." [R 354]

ARGUMENT I.

THE APPELLATE COURT MAY NOT REJECT THIS APPEAL OUTRIGHT BECAUSE APPELLANT HAS MET THE STANDARD OF REVIEW BY MARSHALING ALL OF THE EVIDENCE AND DEMONSTRATING CLEAR ERROR.

The Appellee argues that "the Court may reject this Appeal outright because Appellant has failed utterly to meet the standard of review requiring Appellant to marshal all of the evidence and show clear error." [Response Brief of Appellee] The Appellee cites Oneida/Slic v. Oneida Cold Storage & Warehouse, Inc., 872 P.2d (Utah App. 1994) which states:

> To successfully challenge a trial court's findings of fact, Appellate counsel must play the devil's advocate. [Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshaling] duty..., the challenger must present in comprehensive and fastidious order every scrap of competent evidence introduced at trial which supports the very finding Appellant resists. West Valley v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991); accord In Re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989); State v. Walker, 743 P.2d 191, 193 (Utah 1987); Commercial Union Associations v. Clayton, 863 P.2d 29, 36 (Utah App. 1993); Ohline Corp. v. Granite Mill, 849 P.2d 602, 604 (Utah App. 1993).
>
> Oneida further states:
>
> Once Appellants have established the pillar supporting their adversary's position, then they "must ferret out a fatal flaw in the evidence" and show why those pillars fail to support the trial court's findings. West Valley City v. Majestic Inv. Co., 818 P.2d 314. [Page 1053]
>
> Appellants who merely present carefully selected facts and excerpts from trial testimony in support of their position do not properly marshal the evidence as required to challenge the trial court's factual findings. [Page 1051]

Marshaling the evidence first entails marshaling, or listing, all of the evidence supporting the findings that are challenged. Alta Indus, Ltd. v. Hurst, 846 P.2d 1282, 1286 (Utah 1993); Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991); State v. Moosman, 794 P.2d 474, 475-76 (Utah 1990); Grayson Roper, Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989); Reid v. Mutual of Omaha Insurance Co., 776 P.2d 896, 899-900 (Utah 1989); In Re: Estate of Bartell, 776 P.2d 885, 886 (Utah 1989); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985); In Re: Estate of Hamilton, 869 P.2d 971, 977 (Utah App. 1994); Willey v. Willey, 866 P.2d 547, 551 n.2 (Utah App. 1993); Baker v. Baker, 866 P.2d 540, 543 (Utah App. 1993); Robb v. Anderson, 863 P.2d 1322, 1327; Commercial Union Assoc. v. Clayton, 863 P.2d 29, 36 (Utah App. 1993);

State v. Hayes, 860 P.2d 968, 972 (Utah App. 1993); State v. Gray, 851 P.2d 1217, 1225 (Utah App. Cert. denied, 860 P.2d 943 (Utah 1993)); King v. Industrial Commission, 850 P.2d 1281, 1285 (Utah App. 1993); Johnson v. Board of Review, 842 P.2d 910, 912 (Utah App. 1992); State v. Peterson, 841 P.2d 21, 25 (Utah App. 1992); State v. Hurst, 821 P.2d 467, 471 (Utah App. 1991).

In the present case, the Appellant has "listed" or "marshaled" all of the evidence supporting the findings that are challenged. Appellant has "marshaled" all the evidence in the section entitled "Statement of Facts" beginning on page 7 and concluding on page 30. The Statement of Facts includes testimony given by Ila Ernstsen, Terral Ernstsen, Randall Petersen (Defendant's expert) and Guy Morris (Plaintiff's expert). In addition, Appellant has provided the Appellate Court a copy of all exhibits introduced at the trial in the Appendix of Appellant.

Once the evidence is listed or marshaled with the appropriate citations to the record, the Appellant must then demonstrate that the marshaled evidence is legally insufficient to support the findings when viewing the evidence and inferences in a light most favorable to the decision. Stewart v. Board of Review, 831 P.2d 134, 138 (Utah App. 1992). The Appellant has met the burden of demonstrating that the marshaled evidence is legally insufficient to support the findings when viewing the evidence and inferences in a light most favorable to the decision. [See Brief of Appellant, "Argument", pages 32-43] After marshalling all the evidence, the Appellant has clearly demonstrated that the Court committed error by failing to consider the historical income of the Plaintiff by failing to consider net corporate income and mixing the division of assets with the post-marital duty of support and maintenance. Accordingly, the Appellant's duty to marshal the evidence

has been properly discharged and the Appellate Court must consider the merits of the challenges to the findings.

ARGUMENT II.

THE COURT COMMITTED AN ERROR IN LAW BY AWARDING THE DEFENDANT $1,450 PER MONTH AS ALIMONY.

A. The Appellant's Appeal should not be dismissed because the District Court denied Defendant's Motion for New Trial.

The Appellee argues that Appellant's Appeal should be dismissed because the District Court denied Defendant's Motion for New Trial. Rule 59, Utah Rules of Civil Procedure, states that:

> (a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all of any of the parties on all or any part of the issues for any of the following causes; provided, however, that on a motion for a new trial and an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment: (7) error in law.

A Rule 59 Motion for New Trial is a post-trial remedy that is outlined in the Utah Rules of Civil Procedure. The fact that the District Court rejected the Defendant's Motion for New Trial may not be construed as "bolstering" Appellee's position that the Appeal should be dismissed. Rule 59, Utah Rules of Civil Procedure, contemplates the fact that a party may file an Appeal. Pursuant to Hume v. Small Claims Court, 590 P.2d 309 (Utah 1979); Interstate Land Corp. v. Patterson, 797 P.2d 1101 (Utah App. 1990), a timely Motion under Rule 59 terminates the running of the time for Appeal of a Judgment and the time for Appeal does not begin to run again until the Order granting or denying such Motion is entered. Consequently, the fact that the District Court denied Defendant's Motion for New Trial is not a basis on which Defendant's Appeal should be dismissed.

B. The District Court failed to consider Defendant's needs.

The Appellee argues that the District Court fairly considered wife's needs. The Appellee states:

> The Court merely observed, with only nine payments remaining on the cabin, she could reduce the $700 plus payment to a nominal amount. The Court also properly observed the vehicle could be financed to reduce its monthly payment. [Response Brief of Appellee, page 26]

However, the Court made the following specific findings:

25. The Court recognizes that the Defendant has a $721 per month debt owing to Zions Bank for a garage; a $455 auto payment, and a $300 per month tax liability on alimony.

26. The Court finds that based on the alimony award it is reasonable that the Defendant refinance the two major expenses of her current monthly expenses, the $721 mortgage payment and the $455 auto payment over a 15-year period.

27. The Court finds that based on the alimony award, the Defendant has an obligation to engage in creative financial planning. [See Appendix of Appellant]

The Judge found that a woman of 61, having no abilities, being unemployed, and no income history, would be able to refinance her liabilities over 15 years. Even after stating that he recognized the wife's needs, the Judge completely ignored her needs. The Judge made specific findings for the restructuring of the Defendant's liabilities, which are not possible given the Defendant's health and age, income and ability, and the fact that no financial institution will finance an automobile for 15 years.

C. The District Court failed to consider Defendant's ability to produce sufficient income for herself.

The Appellee argues that the District Court fairly considered wife's ability to produce income for herself. The Appellee argues that the Court considered:

> Evidence supporting the finding that the parties never lived in the Fruitland, Utah, cabin together, that she lived for the past year in her sister's condominium, that she cannot travel to Fruitland in winter months, and that she plans to sell the cabin for her retirement." [Response Brief of Appellee, page 27]

However, the Defendant testified that she was not currently employed and that she has not worked for a wage in about 40 years. [TR 531] The Defendant also testified that she is currently a severe diabetic and is required to take insulin on a daily basis and it would be very difficult for her to hold down a job because of her diabetic condition and the fact that she is 61 years of age. [TR 532]

The Appellee argues that the District Court correctly treated her "recreational property" as income producing that would offset husband's truck leases. However, the Defendant testified that the home at Fruitland was the marital residence because the Plaintiff sold the family home in Salt Lake City and purchased the Fruitland residence and that she is going to live in the Fruitland home on a permanent basis. [TR 533 and 534] That testimony was unrefuted by any evidence and testimony presented by the Plaintiff. It is clear that the Court erred in its application of the law in this case. It is unreasonable and inappropriate to require the Defendant to use her automobile, her furniture and her home to generate income to set off against the Plaintiff's ability to pay alimony.

D. <u>The District Court failed to consider all of Plaintiff's income</u>.

The Plaintiff has attached two exhibits (AEE's Addenda 10 and 11) that were not admitted into evidence at the trial. These two exhibits were created solely for use in the Response Brief of Appellee. These exhibits were not part of the Court record and should be stricken.

Nonetheless, after reviewing these two exhibits, they contain inaccurate and misleading information which is not supported by the record. For example, in column 1 entitled "Husband's Monthly Net Available Funds at His Historical Salary Minus Truck Leases," the Plaintiff states that his pre-September 1992 net income was $501.51 per week. The Plaintiff gives the citation of TR 32. However, in reviewing TR 32, there is no testimony given stating that Plaintiff's pre-September 1992 net income is $501.51 per week. In column 2 entitled "Husband's Monthly Net Available Funds at His Historical Salary Plus Truck Leases," the Plaintiff states that his net salary is $2,173.25. That figure is not supported by the record nor by Plaintiff's Exhibit No. 4. Further, closer examination of document "AEE" discloses that it is replete with inaccuracies. For instance, Appellee mixes "gross" and "net" incomes; he fails to reduce the debt accurately; and he includes a debt that is paid off in four months. However, the record does state that Plaintiff's gross income per month is $5,530.60, which supports Defendant's request for $2,750 per month in alimony.

The Plaintiff argues that the District Court equitably distributed husband's available income. The Plaintiff argues that Defendant's own "expert conceded that he had reviewed no documents and offered no testimony to rebut Morris' testimony that corporate funds were not available to husband." [Response Brief of Appellee, page 28, Plaintiff fails to provide a citation to the record] However, this statement is incorrect. In fact, the record reflects that Randall Petersen testified that he reviewed the parties' tax returns for the years 1988, 1989, 1990, and 1991 [TR 411], and that corporate funds should be added back to Plaintiff's income. Randall Petersen testified as follows:

Craig Peterson: Then the term, the next term, "spendable income add back corporate net income, why have you done that? Where did you get those numbers?

Randall Petersen: The corporate income represents the net income after tax which was part of the valuation report. I believe Schedule 3 shows the net after tax corporate income for the years 1988 through 1991. And the reason I show that in there is simply because if he chooses to make his salary whatever he makes it and leave income in the corporation, it seems to me that is still income available to him.

Craig Peterson: Let me ask you in that regard, were you the expert in the case entitled Muir v. Muir?

Randall Petersen: Yes.

Craig Peterson: And in fact, did you testify before this district court in that case?

Randall Petersen: Yes.

Craig Peterson: And did you testify using exactly this same methodology in that case?

Randall Petersen: I think this is a basic concept.

Judge Young: I do not have any problem with this methodology.

Craig Peterson: Did you testify in Muir v. Muir that corporate profits--first of all, was Mr. Muir, as you understand the testimony and the evidence presented in that trial, a sole stock holder in that case as is Mr. Ernstsen here?

Randall Petersen: I believe he was, yes.

Craig Peterson: In that case did you testify that Mr. Muir had the corporation profits remaining at each year-end which should be added to his income?

Randall Petersen: I believe that is the case, yes.

Craig Peterson: And did you take that same approach in that case?

Randall Petersen: Yes.

Craig Peterson: All right. Is it your position then that the corporate profits on average should be added back to Mr. Ernstsen's spendable income or cash available to him to spend?

Randall Petersen: I believe it should, yes.

Craig Peterson: Then in making this analysis, you did not at any time include benefits, other benefits he may receive from the corporation such as automobile expense or paying professional fees or any other thing which might come out of the business; is that correct?

Randall Petersen: This corporate income is after those deductions.

Craig Peterson: So in addition to what you show here as spendable income, $74,000 on average, $74,839, you have not included the benefits which Mr. Ernstsen gets from the company.

Randall Petersen: No.

Craig Peterson: For instance, his automobile payment.

Randall Petersen: No.

Craig Peterson: Or his auto expense.

Randall Petersen: His income is actually the lease payment which was made to him.

Craig Peterson: I understand that.

Randall Petersen: But yeah, it does not add back in personal benefits derived by the corporation, no. [TR 412-414]

Randall Petersen testified under cross-examination with respect to Exhibit D-7, "Add Corporate Income," that he did not have the financial statements but had the report of the appraiser Vaughn Cox which included Balance Sheets and Summary Income Statements. Randall Peterson testified on cross-examination:

Clark Ward: So it would be foolhardy for someone to take any of this money, just spend it on himself for whatever reason. He would be putting his company and all his employees and his own salary at risk in doing so wouldn't he?

Randall Petersen: Well, I suppose you can make that argument, but if he leaves his salary low and leaves the earnings in there, then you wouldn't. Then you have got his income low. I don't know how you can ignore the fact that he leaves income in the corporation. That's his decision. And he could have cut his salary to $20,000 and left $50,000 profit in there too.

Plaintiff's counsel cites Muir v. Muir, 841 P.2d 736, 741 (Utah App. 1992), and states that the Muir decision supports husband's position "because it holds corporate net profits should not be added to husband's income unless it can be shown that the money stayed in the corporation for discretionary improvements that would benefit husband rather than to "maintain [the businesses] in a condition." [Response Brief of Appellee] In the Muir case, however, the Court made the finding that the husband needed to reinvest in the business. The Appellate Court stated "the finding that husband would need to reinvest in the business is problematic because the Court failed to find whether the reinvestment constituted a "discretionary decision...to expand and improve" or whether the reinvestment was to "maintain it in its present condition." [Muir quoting Jones v. Jones, 100 P.2d 1076 (Utah 1985)] In the present case, the Court did not consider the corporate net income in the amount of $14,385 and made no findings regarding that corporate net income. The Muir case states that the Court is required to consider corporate income as well as review the benefits received from the corporation. In the present case, the Court not only failed to consider corporate net income, but also failed to take into consideration the personal benefits Plaintiff is receiving from the corporation. For example, the Defendant testified that he does not have any living expenses as he is living with his girl friend, Michelle Howard, who is employed by Ernstsen Plumbing. [TR 494] The Plaintiff further

testified that he and Michelle Howard intend to get married following the divorce from Ila Ernstsen. [TR 510] Plaintiff testified that his personal automobile, auto insurance, tax and license, and his health, accident and life insurance are paid by Ernstsen Plumbing. [TR 505, 507 and 509]

The Plaintiff states that "wife offered no evidence to rebut husband's testimony that his business is failing and the corporate profits were left in the corporation to save the business." [Response Brief of Appellee, page 28] The Plaintiff did testify that he depleted all of the money in his bank account, "gone without" and borrowed $1,500 from Ernstsen Plumbing to pay wife's temporary alimony. However, there is no testimony given by the Plaintiff that indicates his business was failing and the corporate profits were left in to save the business. Furthermore, the Plaintiff's expert, Guy Morris, testified that if the corporate earnings were cash, it would be available for distribution. [TR 526-527]

ARGUMENT III.

JUDGE YOUNG PREDICATED HIS PERSONAL HYPOTHETICAL POSITION OF AN ADVOCATE IN SUPPORT OF HIS THEORY RATHER THAN ALLOWING THE CASE TO BE TRIED TO HIM. CONSEQUENTLY, JUDGE YOUNG SHOULD BE REMOVED FROM FURTHER PROCEEDINGS IN THIS CASE AND A NEW JUDGE SHOULD BE ASSIGNED.

The Plaintiff argues that "the recusal issue is moot since wife's appeal lacks any legal or factual basis for reversal and remand." [Response Brief of Appellee, page 30] The Defendant has marshaled all of the evidence in this case and has demonstrated that the findings made by the District Court are erroneous and should be reversed and remanded.

The Plaintiff argues that "The trial was to the bench; hence, there was no jury to prejudice and Judge Young expressed none." [Response Brief of Appellee, page 30] Obviously, a jury was not involved in this matter as it was a domestic proceeding. Plaintiff's argument that Judge

Young did not express any prejudice is false. Judge Young's prejudice and bias against Defendant's position is clearly evidenced by the fact that 60% of the examination of Randall Petersen was conducted by Judge Young and the fact that Judge Young became so attached to his personal position that he ascribed earning capability not only to the home but to the Defendant's furniture and furnishings as well as to her automobile.

Appellee argues that "Wife waived all claims related to recusal by not raising them immediately after the facts which formed the basis for disqualification became known." [Response Brief of Appellee, page 30] In support of this assertion, Plaintiff cites Madsen v. Prudential, 767 P.2d 538 (Utah 1988), and states that the Madsen case is nearly identical to the present case. However, the Madsen case can be clearly distinguished from the present case. In the Madsen case, the Appellate Court states "that a party who has reasonable basis for moving to disqualify a Judge may not delay in hope of first obtaining a favorable ruling and then complain only if the result is unfavorable." [At page 542] In the Madsen case, the Plaintiffs were representatives of a certified class of borrowers whose trust deeds with Prudential Federal Savings & Loan Association (hereinafter "Prudential") contained language identical to that contained in Madsen's trust deed. In 1984, the action was assigned to Judge Kenneth Rigtrup. At the close of the trial, Judge Rigtrup ruled from the bench. However, prior to Judge Rigtrup's ruling an exchange occurred between the Court, the attorney for Prudential and the attorney for the Madsens whereby it was brought to everyone's attention that Judge Rigtrup had been a customer of Prudential Federal Savings & Loan Association. The attorneys for Prudential did not object during the course of the exchange, and after the ruling, Judge Rigtrup asked if either wished to take any exceptions, and Prudential's attorney

stated only that an appeal was anticipated before any class issues would be addressed. However, no specific objection to Judge Rigtrup's qualifications was voiced. Thirty-nine days after Judge Rigtrup announced his decision, Prudential raised its first formal Objection to Judge Rigtrup's qualifications to hear the case by filing a Motion for Disqualification under Rule 63(b), Utah Rules of Civil Procedure. In that case, the Appellate Court ruled that the Motion was not timely. In the present case, the extent of Judge Young's bias was not fully revealed until after the trial had concluded. The trial concluded on January 8, 1994, and the Motion for Recusal was filed on February 12, 1994. In the Madsen case, it is clear that the Defendant did raise the issue of disqualification in hopes of obtaining a favorable ruling. In the present case, however, Judge Young's bias and prejudice was not revealed until the trial had been concluded at which time Defendant's counsel filed a Motion to Disqualify as soon as practicable after the bias and prejudice was known.

Rule 63(b), Utah Rules of Civil Procedure, states:

> Whenever a party to an action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further than except to call in another judge to hear and determine the matter.
>
> Every such affidavit shall state facts and the reasons for the belief that such bias or prejudice exists and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known...

Consequently, Defendant complied with the requirements of Rule 63(b), Utah Rules of Civil Procedure. In any event, it would be appropriate for the Appellate Court to consider the Defendant's claim of bias pursuant to Marchant v. Marchant, 743 P.2d 199 (Utah App. 1987).

The Appellate Court addressed the issue of bias sua sponte as the issue was not brought up in the lower Court.

ARGUMENT IV.

ATTORNEY'S FEES

Plaintiff argues that Defendant's "Request for Attorney's Fees must be rejected out of hand." [Response Brief of Appellee, page 32] However, Defendant was awarded $4,000 in attorney's fees by the District Court. In a domestic case, where the trial Court has awarded attorney's fees and the receiving spouse has prevailed on the main issues, the Court generally awards fees on Appeal. Hall v. Hall, 858 P.2d 1018,1037 (Utah App. 1993); Allred v. Allred, 835 P.2d 974, 979 (Utah App. 1992). Accordingly, the Appellate Court should award the Appellant attorney's fees on appeal and remand for determination of the amount of reasonable fees.

CONCLUSION

Appellee's Response Brief was so riddled with errors and misstatements that approximately one-half of the Reply Brief was devoted to correcting these errors.

Appellee's Brief fails to refute any of the arguments presented to the Court for review. It is evident that the Court committed error by failing to recognize Defendant's historical income and ignoring all of Defendant's present income, attributing income potential to dormant assets awarded to the Defendant, attributing income to the Defendant which did not exist as a matter of evidence, and by demonstrating prejudice and bias by becoming an advocate.

The Court should remand this case with instructions to the lower Court to enter a award of alimony of $2,750 per month retroactive to the date of the entry of the original Decree. Further, Judge Young should

be directed to recuse himself from further proceedings in this case and a new Judge should be assigned. Finally, the Court should award the Appellant attorney's fees on Appeal and remand for determination on the amount of reasonable fees.

DATED this 24 day of October, 1994.

JOANNA B. SAGERS
Attorney for Defendant/Appellant

CERTIFICATE OF HAND DELIVERY

I hereby certify that I caused to be hand-delivered, a true and correct copy of the foregoing, REPLY BRIEF OF APPELLANT, this 24 day of October, 1994, to:

Clark R. Ward, Esq.
64 East 6400 South, Suite 205
Salt Lake City, Utah 84107

J10\ernst.rep